DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

DEC 1 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185

INITIAL COMMENTS OF NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; US CONFERENCE OF MAYORS; NATIONAL ASSOCIATION OF COUNTIES; MINNESOTA ASSOCIATION OF COMMUNITY TELECOMMUNICATIONS ADMINISTRATORS (MACTA); ILLINOIS ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; GREATER METRO TELECOMMUNICATIONS CONSORTIUM (GMTC); MONTGOMERY COUNTY, MARYLAND; CITY AND COUNTY OF DENVER, COLORADO; CITY OF CHICAGO, ILLINOIS; MT. HOOD CABLE REGULATORY COMMISSION (MHCRC); CITY OF CONCORD, CALIFORNIA; AND CITY OF SPRINGFIELD, MISSOURI

SUMMARY

Local governments urge the FCC to state authoritatively that cable modem service is a cable service. A cable operator providing cable modem access to the Internet fits the definition of "cable service" under Title VI. Moreover, classifying cable modem service as a cable service is consistent with Congressional intent.

There is an existing and adequate legal and policy framework for the classification and regulatory treatment of cable modem service. And the recent actions by federal courts and by individual cable operators illustrate the need for the FCC to state unambiguously that the federal statute does not create a regulatory gap that allows individual cable modem service providers to escape obligations by "straddling" Title II and Title VI.

Local Governments submit that the technologies of telecommunications and cable television converge and the regulatory regimes overlap in the offering of Internet access. The overlap of regulatory regimes is proven by the conflicting court decisions cited in the NOI. Those decisions generally can be reconciled if the Commission recognizes that broadband Internet access may be offered under either Title II or Title VI.

The overlap of regulatory regimes is not a flaw -- it is a feature. It is a product of the Communication Act's design to afford both cable operators and telecommunications carriers ample flexibility and incentive to innovate while avoiding a regulatory gap that could advantage one competitor over the other. The overlapping regulatory regimes generally preserve a level playing field.

Title VI creates an effective existing federal/local partnership. The federal/local partnership in the regulation of the cable industry should be embraced, not abandoned, as the cable industry moves into the Twenty-first Century. Local governments have a constructive role to play in evaluating the needs of their communities and in identifying potential threats to meaningful competition. The Commission should recognize, accept, and endorse the unique capability of local franchising authorities to represent the interests of consumers in discrete markets. The Commission should acknowledge that local governments have authority to enforce consumer protection and customer service requirements. Related to cable modem service because cable modems are "facilities and equipment" and "broad categories of video programming and *other services*," within title VI. The Commission should take care to preserve the authority of local franchising authorities to address cable modem service issues under Title VI.

The Commission should explicitly embrace open access as the ultimate policy goal; reserve it's authority to impose regulations consistent with that goal; and preserve local authority to address artificial impediments to meaningful competition in discrete markets.

Local governments are generally optimistic that the marketplace will foster meaningful competition and will encourage cable operators to provide cable modems to consumers with choices among competing ISPs. However, local governments urge the Commission to put the cable industry on clear notice that the Commission expects the timely provision of functionally and economically equivalent access to multiple internet service providers.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185

INITIAL COMMENTS OF NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; US CONFERENCE OF MAYORS; NATIONAL ASSOCIATION OF COUNTIES; MINNESOTA ASSOCIATION OF COMMUNITY TELECOMMUNICATIONS ADMINISTRATORS (MACTA); ILLINOIS ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; GREATER METRO TELECOMMUNICATIONS CONSORTIUM (GMTC); MONTGOMERY COUNTY, MARYLAND; CITY AND COUNTY OF DENVER, COLORADO; CITY OF CHICAGO, ILLINOIS; MT. HOOD CABLE REGULATORY COMMISSION (MHCRC); CITY OF CONCORD, CALIFORNIA; AND CITY OF SPRINGFIELD, MISSOURI

The National Association of Telecommunications Officers and Advisors; the US Conference of Mayors; the National Association of Counties; the Minnesota Association of Community Telecommunications Administrators (MACTA); the Illinois Association of Telecommunications Officers; the Greater Metropolitan Telecommunications Consortium (GMTC[1]); Montgomery County, Maryland; the City and County of Denver, Colorado; the City of Chicago, Illinois; the Mt. Hood Cable Regulatory Commission

[1] The GMTC is a consortium of 28 greater metropolitan Denver, Colorado communities formed to facilitate regulation of telecommunications issues on behalf of their jurisdictions. GMTC members include: Adams County, Cherry Hills Village, Golden, Littleton, Arapahoe County, Commerce City, Greenwood Village, Northglenn, Arvada, City and County of Denver, Idaho Springs, Parker, Aurora,

(MHCRC);[2] City of Concord, California; and City of Springfield, Missouri; (collectively, The Local Government Coalition) hereby submit the following comments in response to the Commission's above- captioned Notice of Inquiry ("NOI").

I. Introduction

The Local Government Coalition responds to the Commission's request for comments addressed to the classification of cable modem service, and urges the Commission to conclude that cable modem service is a cable service. Specifically, the following issues raised by the NOI are addressed below:

- whether cable modem service and/or the cable modem platform is a cable service
- the implications of classifying cable modem service and/or the cable modem platform as a cable service
- whether cable modem service and/or the cable modem platform is a telecommunications service subject to Title II
- whether cable operators should be treated as common carriers

The Local Government Coalition also addresses issues surrounding open access, and urge the Commission to embrace open access as the ultimate goal of its cable broadband regulatory policy; to reserve its authority to insure the achievement of that goal on a nationwide basis if marketplace forces do not fulfill the promise of meaningful competition and real consumer choice; and to acknowledge and affirm the concurrent authority of local governments to address the issue in discrete markets pursuant to their

Douglas County, Jefferson County, Sheridan, Brighton, Edgewater, Lafayette, Thornton, Broomfield, Englewood, Lakewood, Westminster, Castle Rock, Glendale, Lone Tree, Wheat Ridge.

authority over facilities and equipment, broad categories of video programming and other services, and consumer protection matters. Specifically, the following issues are addressed:

- Whether the Commission should encourage open access to the cable modem platform
- whether a market-based approach will adequately achieve that objective, or whether the Commission should adopt another approach
- the Commission's authority to require open access
- the conditions under which the Commission should mandate open access to the cable modem platform
- whether uniform requirements for high-speed services provided using different platforms would facilitate the deployment of all such services, and whether the Commission could implement uniform requirements consistent with its statutory mandate.

II. Statement of Principles

The Communications Act of 1934, as amended by Congress in 1996[3], establishes a system of shared regulatory authority between the states and the federal government. The Federal Communications Commission ("FCC") regulates "interstate communication by wire and radio,"[4] subject to the acknowledged authority of local and state governments over public rights-of-way. The Commission's jurisdiction over interstate communications itself has limits. For example, the Commission may not broadly preempt federal, state or local health and safety regulations, zoning regulations, and

[2] The MHCRC, by intergovernmental agreement, conducts cable regulatory matters on behalf of six Oregon local governments, including the City of Portland, Multnomah County, and the Cities of Gresham, Troutdale, Fairview, and Wood Village.

[3] 47 U.S.C. §151 et seq.

[4] 47 U.S.C. §151(a).

Equal Employment Opportunity requirements. The states (and local governments pursuant to delegated state authority) regulate "intrastate communications by wire and radio."[5] Cable services, both interstate and intrastate, fall within Title VI of the Communications Act. Local governments and the FCC each have a measure of independent authority, but also share certain regulatory jurisdiction over cable system requirements related to "facilities and equipment,"[6] and consumer protection.[7] Thus, for example, the FCC has authority to establish minimum customer service standards, but each state and each locality has the authority to establish more rigorous requirements, and the FCC is not authorized to intrude upon that authority.

Local governments are committed to the following regulatory principles:

1. Encourage rapid deployment of advanced networks which enhance the welfare of our citizens and the economic development of our communities;
2. Ensure advanced network providers address local community needs and interests;
3. Protect consumers from unfair and unreasonable business practices;
4. Encourage the development of meaningful competition; and
5. Ensure that the private, for-profit use of public property is efficiently and effectively managed, fully compensated, and consistent with its dedication to serve the public interest.

---

[5] ". . .(S)ubject to the provisions of section 301 and Title VI of this chapter, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." . . .
47 U.S.C. § 152(b).

[6] 47 U.S.C. § 544(a).

[7] 47 U.S.C. § 552.

Therefore local governments fully join with the FCC in endorsing the four "complementary goals" identified in the NOI, para 2:

- to promote widespread and rapid deployment of high-speed services, while at the same time to preserve and promote the "vibrant and competitive free market" that exists for the Internet;
- to create a legal and policy framework for cable modem service and the cable modem platform that will foster competitive deployment of new technologies and services by all entities, including cable operators and Internet service providers (ISPs) alike;
- to instill a measure of regulatory stability in the market to encourage investment in all types of high-speed networks and innovation in high-speed services; and
- to develop a national legal and policy framework in light of recent federal court opinions that have classified cable modem service in varying manners.

Local governments' support for the fourth goal requires explanation. Local governments believe there is an existing and adequate legal and policy framework for the classification and regulatory treatment of cable modem service. At the same time, recent actions by federal courts and by individual cable operators call for a clear FCC restatement of the agency's regulatory jurisdiction and goals. Potential investors in advanced communications services deserve certainty in the legal rules that will apply to the converging and overlapping advanced services. Cable operators need to know which legal fora will oversee and address problems that the marketplace cannot resolve. Subscribers and internet service providers interested in using the cable modem service deserve a statement of the legal rights and responsibilities that will govern their relationships with cable system operators.

Cox Communications' recent actions are a good example of the problems that are arising as long as the Commission fails to act. Cox has been operating in all respects as if

Internet cable modem service were a "cable service." Cox has not paid money into the universal service fund; it has not obtained necessary state or local certificates required under Section 253; and it has not interconnected nor made its facilities available to others under Section 251. Nonetheless, the company now refuses to pay franchise fees mandated under Title VI.[8] In other words, the company asserts that it has no obligations under either Title VI or under Title II and applicable state law. This is inconsistent with the basic structure of the Telecommunications Act, and is unfair to telecommunications service providers, as well as to other cable operators.

The FCC should state unambiguously that the federal statute does not create a regulatory gap that allows individual cable modem service providers to escape obligations by "straddling" Title II and Title VI.

Specifically, this proceeding provides the FCC the opportunity to 1.) restate and clarify the legal and regulatory framework; 2.) set the legal rules for the market development of cable modem service, and 3.) define the conditions under which local franchise authorities and the FCC will take additional steps to protect consumers and cable modem service users from unfair and unreasonable business practices by cable modem service providers.

III. The Regulatory Classification of Cable Modem Service

A. Cable Modem Service Is Primarily a Cable Service

8 See Attachment A.

Local governments urge the FCC to state authoritatively that cable modem service is a cable service, subject to the regulatory authority granted to the FCC and reserved to local governments pursuant to Title VI of the Communications Act.

A cable operator providing cable modem access to the Internet fits the definition of "cable service" under Title VI. A cable operator is providing its subscribers "one-way transmission of video programming" and other "information that a cable operator makes available to all [cable modem] subscribers generally." And the cable modem service includes the "subscriber interaction . . . required for the selection or use of" that video programming and generally available information. The subscriber selects the information available through the cable modem service that the cable operator makes generally available to all subscribers of the cable system. The cable operator transmits that information from the head-end to the subscriber. What the cable operator transmits is not always "video programming" (though broadband access to the Internet will make that increasingly the case), but it is "other programming," as defined by the Cable Act, *i.e.* "information that a cable operator makes available to all subscribers generally."[9]

The Eleventh Circuit suggested that Internet access is not "other programming service."[10] The court reasoned that some functions that can be performed via the Internet – transmission of e-mail, for example – involve (somewhat) private communications between a sender and a recipient. Local governments doubt that anyone would subscribe to cable modem service solely to send e-mails. The court ignored the essence of cable modem service, which permits all subscribers the *same* access to the *same* web sites, to

---

9 47 U.S.C. § 522(14).

join the *same* chat rooms, to scan the *same* message boards, and to obtain the *same* "generally available" Internet information. It is the cable operator that makes the same "information" "generally available" to each cable modem subscriber. Each subscriber then interacts with that generally available information and chooses the specific information desired, using his or her own computer to manipulate that information, or to send private inquiries or responses to it. Whether cable modem service is a cable service is not determined by how a subscriber uses Internet information once the subscribed has selected and the cable operator has provided it to the subscriber.[11]

The classification of cable modem service provided to the subscriber stands without regard to whether, or under what terms and conditions, the cable operator provides access to the cable modem platform at the cable head-end. The open access issue is wholly apart from the classification of the service provided to the subscriber by the cable operator. The NOI suggests the contrary, citing the Commission's amicus brief in one of the open access cases for the view that "an open access regime would compel the provision of 'telecommunications facilities.'"[12] That assumption should be revisited. Head-end access versus click-thru access, to one ISP or ten ISPs, affiliated or unaffiliated, does not alter the essential nature of the service provided to the subscriber by

---

10 *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000).

11 On a more technical level, the cable operator is providing a form of "electronic menu" which allows each subscriber to obtain information using the internet's TCP/IP protocols. As explained in a Working Paper published by the FCC's Office of Plans and Policy: (Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, Federal Communications Commission, Office of Plans and Policy, OPP Working Paper No. 30, August 1988 ("*Internet Over Cable*") "The routing mechanisms of TCP/IP do not define the actual *services* provided through the Internet to end users." *Id.*, at 15, citing Kevin Werbach, *"Digital Tornado: The Internet and Telecommunications Policy,"* Federal Communications Commission, Office of Plans and Policy, OPP Working Paper Series No. 29, p. 19, March 1997 ("*Digital Tornado*"))

12 NOI, ¶ 18, n. 37, citing *MediaOne Group, Inc. v. County of Henrico*, 97 F.Supp.2d 712, 714 (E.D. Va. 2000), *appeal pending*, 4th Cir. No. 00-1680, Amicus Curiae Brief of the Federal Communications Commission at 13, 18-24.

the cable operator; and it does not compel or justify a re-characterization of the cable modem platform as a "telecommunications facility."

Classifying cable modem service as a cable service is consistent with Congressional intent. In 1996, Congress acted to bring cable modem service within the definition of "cable service" when it added "or use" to the pre-existing definition of "cable service":

> (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service [information that a cable operator makes available to all subscribers generally], and (B) subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service."[13] 47 USC 522(6). [emphasis added].[14]

Congress intended to enhance the operational flexibility afforded cable operators, encouraging innovation and the increased usefulness of cable service without catching cable operators in the net of Title II regulation. According to the House Report accompanying the 1996 amendments, the inclusion of the words "or use" was meant to "reflect[ ] the evolution of video programming toward interactive services."[15] The legislative history explicitly recognized that new cable services would depart from traditional cable television programming, but remain "cable service" as defined. Even in 1984, long before the 1996 amendment to the Act, Congress had recognized that the ability of subscribers to download information from various locations was a cable service. "For instance, the transmission and downloading of computer software...to all

---

13 For clarity of meaning, the definition of "other programming service" has been substituted for that phrase in the definition of "cable service." 47 U.S.C. §522(14).

14 *See Internet Over Cable* for extensive discussion of legislative history of the "or use" amendment by Congress.

15 H. Rep. No. 104-204, at 97 (1996) [*reprinted in*] 1996 U.S.C.C.A.N. 10, 64.

subscribers to this service for use on personal computers would be a cable service...Moreover, the fact that such downloaded software could be used...for a wide variety of purposes...would not make the *transmission or downloading a non-cable service."* [emphasis added].[16] The distinction in 1984 was tied to interactivity –a service that permitted a subscriber to make individualized selections through manipulation of data was not a cable service, while a service that gave a limited set of menu choices with a pre-ordained set of responses would be a cable service. In 1996, Congress added the word "use" to permit subscribers to interact, and therefore obtain more individualized responses in connection with a cable service. It was this change that encouraged cable operators to begin to offer cable modem service. Moreover, while Congress in 1984 envisioned that an operator with the necessary authorizations could provide telecommunications services, it did not assume the provision of a telecommunications service would exclude the *other* services offered by the cable operator from the definition of "cable services." Thus, Congress recognized the cable operator could offer "cable system capacity for the transmission of private data . . . [17] [in a manner that] would not be a cable service because only specific subscribers would have access to that information...." But that did not mean that all services, or all services in a bundle of services would be classified as non-cable services: "the combined offering of a non-cable service with service that by itself met all the conditions for being a cable service would not...transform the cable service into a non-cable communications service."

---

16 H.R. Rep. No. 98-934, at 42 n. 35; NOI para 20.

17 Interestingly, some operators are prohibiting the use of their Internet access service to create virtual private networks, and instead sell a separate product to businesses for that purpose.

Cities recognize that there are a variety of services cable operators might offer that could be classified as telecommunications service. Dial-up phone-to-phone communications that utilize the Internet as the transmission path would be an example. But operators are not at this point offering cable modem service and related Internet access functions in a way that raises any real questions concerning cable modem service legal classifications.

Since 1984, Congress has taken pains to avoid the imposition of common carrier regulation on cable operators, providing then that "any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."

47 U.S.C. § 541(c).

Congress reinforced that objective in 1996 when it precluded local governments from requiring that a cable operator must offer telecommunications services as a precondition for issuing a cable franchise:

> Except as otherwise permitted by sections 611 and 612, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise. ¶47 U.S.C. § 541(b)(3)(D).

Consistent with Congress' objectives, a cable operator's assumption of the responsibilities of a telecommunications carrier should not be an accident or a surprise to the cable operator and its investors. Nor should a change in legal regulatory status occur simply because cable services naturally evolve into more advanced forms. In the case of ambiguity, the Congress' evident intention to preserve distinct regulatory regimes should control.

B. The Communications Act Permits But Does Not Require Title II Regulation of Broadband Internet Access Service.

The 1996 amendments to the Cable Act anticipated that a cable system operator could simultaneously offer telecommunications services and cable services over its cable system.[18] The cable operator would simultaneously be a telecommunications carrier providing telecommunications services[19] and a cable operator providing cable services.[20] However, a cable operator's undertaking to provide telecommunications services has consequences. When a cable operator offers telecommunications services, it becomes subject to Title II regulation, and the concomitant obligations that apply to all telecommunications carriers under Title II.

As noted in the NOI, the Communications Act and state laws impose a "wide variety" of obligations on telecommunications carriers.[21] These include the duty to provide nondiscriminatory interconnection;[22] the duty to contribute to universal service;[23]

---

18 "If a cable operator . . . is engaged in the provision of telecommunications services—. . . (ii) the provisions of this title shall not apply to such cable operator or affiliate for the provision of telecommunications services. . . ."
47. U.S.C. § 541(b)(3)(A).

19 "TELECOMMUNICATIONS CARRIER- The term 'telecommunications carrier' means any provider of telecommunications services. . . . A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services. . . ."
47 U.S.C. §153(44).

20 "(T)he term 'cable operator' means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system. . . ."
47 U.S.C. §522(5).

21 NOI, ¶ 20

22 "SEC. 251. INTERCONNECTION

(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS- Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

the duty to provide accessible service to persons with disabilities;[24] and the duty to pay reasonable compensation that may be imposed by state or local governments for use of public rights-of-way.[25] If the cable operator offers telephone switched service to its subscribers, it is likely a "local exchange carrier,"[26] subject to additional obligations.[27]

---

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256."
47 U.S.C. §251.

23 "TELECOMMUNICATIONS CARRIER CONTRIBUTION- Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. . . . Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires."
47 U.S.C §254(d).

24 "TELECOMMUNICATIONS SERVICES- A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."
47 U.S.C. § 255(c)

25 "STATE AND LOCAL GOVERNMENT AUTHORITY- Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."
47 U.S.C. §253(c).

Section 253 must be read in light of §601(c)(1), which provides: "This Act and amendments made by this Act shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided in such Act or amendments." Pub. L. No. 104-104, Title VI, sec. 601(c)(1), 110 Stat. 143 (1996) (reprinted in 47 USC §152, historical and statutory notes). There is an accompanying savings provision regarding the "modification, impairment, or supersession of, any State or local law pertaining to taxation." *Id.* at §601(c)(2).

26 (26) LOCAL EXCHANGE CARRIER- The term `local exchange carrier' means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.
47 U.S.C. §153(26).

27 See, e.g., 47 U.S.C. §251(b):

> OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS- Each local exchange carrier has the following duties:
>
> (1) RESALE- The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.
>
> (2) NUMBER PORTABILITY- The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.
>
> (3) DIALING PARITY- The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such

Similarly, when a telecommunications carrier offers video programming, the carrier must choose to become either a cable operator or an open video system operator, subject to the Title VI regulatory regime.[28]

Local Governments submit that the technologies of telecommunications and cable television converge and the regulatory regimes overlap in the offering of Internet access. The simple fact is that Internet access can be purchased by consumers *either* as a cable service, or as a telecommunications service. They are not mutually exclusive, and the Act is almost explicit on that point. Cable service reaches beyond video programming to broadly defined "information that a cable operator makes available to all subscribers generally" and to "subscriber interaction."[29] At the same time, a Title II telecommunications facility can be used to provide video programming, without becoming a "cable system," as long as "the extent of such use is solely to provide

---

providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) ACCESS TO RIGHTS-OF-WAY- The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) RECIPROCAL COMPENSATION- The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

28 While not at issue in this proceeding, the discussion illustrates the error in *City of Austin v. Southwestern Bell Video Servs.*, 1998 U.S. Dist. LEXIS 16332 (W.D. Tex. July 31, 1998), *aff'd*, 193 F.3d 309 (5th Cir. 1999), which concluded that a video programming service offering by an affiliate of a telephone exchange company did not make that subsidiary a "cable operator" for purposes of the cable service offering. The FCC needs to carefully and specifically interpret the interrelated provisions of Title II and Title VI to avoid the same mistake of creating regulatory gaps that burden some competitors while exempting others from appropriate public interest obligations. A fundamental concept of the Telecommunications Act is to impose similar obligations on each provider as it enters and leaves various markets. That is the key to fair competition. As is the case with OVS and cable, one could imagine providing similar services under different public interest rules, but one cannot envision a workable regime where one of the dominating industries can avoid responsibilities by straddling regulatory regimes.

29 47 U.S.C. § 522(6); (14).

interactive on-demand services."[30] A common carrier, point to point switched interactive video service does not necessarily transform a telephone system into a cable system. On the other hand, the same service provided over a system that otherwise *is* a cable system is a cable service, and subject to regulation as such. Similarly, single line, dial up access to an Internet service provider is a "telecommunications service" while shared capacity by cable modem subscribers to access internet "information that the cable operator makes generally available to all subscribers" is a "cable service". The respective subscribers may use the services for the same purposes. But the Communications Act looks to the nature of the offering by the provider, not the use made by the subscriber, to classify the legal status of the service. As with switched video, the Internet access technologies converge in subscriber usage, and the Title II and Title VI regulatory regimes overlap. The only surprise is that the Act so elegantly accommodates the convergence of similar services offered over different technologies.

The overlap of regulatory regimes is not a flaw -- it is a feature. It is a product of the Act's design to afford both cable and telecommunications service providers ample flexibility and incentive to innovate while avoiding a regulatory gap that could advantage one competitor over the other.

The overlapping regulatory regimes generally preserve a level playing field. When providing telecommunications services, the cable operator must comply with federal, state and local requirements that apply to the provision of telecommunication services. When providing video programming, the telephone company must comply with federal, state and local requirements that apply to the provision of video

---

30 47 U.S.C. § 522(7)

programming. In both cases, Congress intended companies providing the same services to assume the same obligations. But at the spearhead of technology's advance, Congress left room for both cable operators and telecommunication service providers to provide a platform for broadband access to new and innovative services and programming. A telecommunications carrier does not become subject to Title VI because it provides a DSL facility to watch a movie. A cable operator does not become subject to Title II, if it provides a cable modem to access www.movie.com which provides e-mail notification of additions to its movie archives.

C. The Commission Can Reconcile Conflicting Court Decisions and Avoid a Regulatory Gap by Recognizing the Overlap Between the Title II and Title VI Regulatory Regimes.

The overlap of regulatory regimes is proven by the conflicting court decisions cited in the NOI.[31] Those decisions generally can be reconciled if the Commission recognizes that broadband Internet access may be offered under either Title II or Title VI. The Commission should recognize that the statement in the 9th *Portland* Circuit opinion that Internet access is a telecommunications service reflects acceptance of AT&T's belated claim at oral argument that it intended to offer a telecommunications service, a claim it assiduously avoided in the trial court. Advancing the claim at the eleventh hour, AT&T seized the advantage of "opting out" of Title VI while avoiding analysis and discussion of the consequences of "opting in" to Title II and application of the full panoply of Title II regulation. By contrast, the district court decision in *County of*

---

[31] *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877 (9th Cir. 2000) (*City of Portland*) (holding that cable modem service comprises both a "telecommunications service" and an "information service."); *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000) (holding that Internet service is neither a cable service nor a telecommunications service); *and MediaOne Group, Inc. v. County of Henrico*, 97 F.Supp.2d 712, 714 (E.D. Va. 2000), *appeal pending*, 4th Cir. No. 00-1680 (concluding that cable modem service is a cable service).

Henrico reflects MediaOne's claim that it was offering a cable service, and that the challenged regulations were preempted by provisions of Title VI.

The Eleventh Circuit's decision in *Gulf Power* is more problematic. Gulf Power was right cable modem service provided by a cable company is neither a telecommunications service nor a cable service. The court erred when failed to recognize that cable modem service is a cable service. While the Commission contended that Internet access was either cable service or enjoyed pole attachment rights under Title II, the court concluded that internet access was neither cable service nor telecommunications service. The court adopted a crabbed construction of the statutory definition that limited cable service to "traditional video programming," and read the broad definition of "other programming service" out of the statute.[32] The *Gulf Power* decision creates a regulatory gap which threatens to swallow the Communication Act's comprehensive scheme of regulating "communications by wire and radio." There is no service or content provided today within the traditional parameters of Title II, Title III or Title VI, which will not sooner rather than later be available via the Internet, and the exclusion of facility-based providers of access to the internet by "wire" or "radio" threatens to render the Act (and the Commission) irrelevant.

---

[32] The Court relied on language from the Report of the Federal-State Joint Board on Universal Service, stating that "Internet service does not meet the statutory definition of a 'telecommunications service.'" In re Fed.- State Joint Bd. on Universal Serv., 12 F.C.C.R. 87 ¶ 69 (1996). However the FCC order largely adopting the Board's recommendations drew a more careful distinction: "we recognize that Internet access includes a network transmission component, which is the connection over a LEC network from a subscriber to an Internet Service Provider, in addition to the underlying information service." *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 ¶ 83 (1997); and emphasized that "connection is a telecommunications service and is distinguishable from the Internet service provider's service offering." *Id.* at ¶ 789.

More recently, a federal district court in Florida came closest to the mark in recognizing that broadband Internet access may be offered either as a telecommunications service or as a cable service.[33] Although the *Broward* decision is deeply flawed in its First Amendment analysis, the district court acknowledged, albeit obliquely and without extended analysis, that cable modem service is a cable service subject to the protections afforded cable operators, while "[DSL] is the telecommunications carriers' version of broadband access."[34] It is doubtful in the first instance that access regulation is at all a burden on cable operators' First Amendment rights; and the district court was clearly mistaken in its conclusion that the challenged ordinance, plainly an economic regulation that was content neutral, was subject to strict scrutiny under the First Amendment. The Court's effort to distinguish *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622 (1994) is decidedly unpersuasive.

D. Public Policy and the Strong Interests of Local Communities Counsel the Classification of Cable Modem Service as a Cable Service.

The NOI invites commenters to discuss "the boundaries of federal, state, and local authority over access to the cable modem platform."[35] Title VI creates an effective <u>existing</u> federal/local partnership. The federal/local partnership in the regulation of the cable industry should be embraced, not abandoned, as the cable industry moves into the Twenty-first Century.

---

33 *Comcast Cablevision of Broward County, Inc. v. Broward County, Florida,* No. 99-6934, 2000 U.S. Dist. Lexis 16485 (November 8, 2000).

34 *Id.* at 6-7.

35 NOI para. 20

Local franchise authorities assure that cable operators address local community needs and interests.[36] Local franchise authorities currently enforce cable operator undertakings to provide broadband Internet access as a part of their cable service, reflecting the assumption by local governments and industry alike that the roll-out of cable modem service is integrally connected to the public benefits of cable service generally. Indeed, the Commission has also addressed cable rate matters under the terms of "Social Contracts" requiring cable operators to invest in facility upgrades, which permit the offering of broadband Internet access, upon the evident premise that cable modem service is within its own Title VI authority.[37]

Local governments are often the first to identify specific market failures. Local governments are best able to judge what community interests can and should be addressed by the cable operator as compensation for privileged use of local rights-of-way. Similarly, local governments are best able to oversee compliance with the Commission's regulation of the cable industry. Local governments are best positioned to evaluate both the promise and the realistic limits of effective competition in discrete markets, recognizing that some markets have competition among multiple delivery systems for high-speed Internet access, while other markets remain unserved and have little prospect of getting effective competition within the next decade.

---

[36] The Federal Cable Act encourages local franchise authorities to examine their local community needs and interests as a precursor to submitting a request for franchise renewal proposal to a cable operator:
A franchising authority may, on its own initiative during the 6-month period which begins with the 36th month before the franchise expiration, commence a proceeding which affords the public in the franchise area appropriate notice and participation for the purpose of (A) identifying the future cable-related community needs and interests, and (B) reviewing the performance of the cable operator under the franchise during the then current franchise term.
47 U.S.C. §546(a)(1).

[37] *See e.g.* Social Contract for Time Warner attached as Attachment B.

The NOI acknowledges that the regulation of cable modem service may not be amenable to a uniform approach: "In light of factors such as the differing treatment accorded different providers and services under the Act itself, however, we note that this national framework may or may not impose the same regulatory obligations on all providers."[38] Local governments agree wholeheartedly. The differences between providers and services pales against the significance of the difference between discrete geographic markets. The most recent data on the deployment of high-speed internet services indicates that there are no providers or only a single provider in more than half of the country's zip codes.[39] Even those statistics fail to reflect the granularity of the relevant geographic market. Within the roughly 47% of zip codes that have two or more providers, there are non-contiguous areas that are served only by a single provider or none at all. The Commission has acknowledged, "we cannot determine from our data the extent to which the presence of high-speed service in a given zip code indicates that high-speed services are widely available, or whether they are restricted to a few customers."[40]

Similarly, treating cable modem service as "cable service" is necessary to protect all consumers. Title VI sustains the consumer protection authority of local governments. Local franchise authorities currently assume responsibility for addressing and resolving consumer complaints. Consumers do not stop to wonder whether cable modem service might be telecommunications rather than cable service before calling the local franchising authority to complain about poor service. State utility commissions do not

---

38 NOI, para. 4.

39 High-Speed Services for Internet Access: Subscribership as of June 30, 2000, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission at T.6 (October 2000).

40 Deployment of Advanced Telecommunications Capability, Second Report, *supra*, ¶ 78.

have the resources or established relations with local cable operators to readily take over that responsibility.

Today, local governments have significant legal authority to impose appropriate consumer protection requirements on cable operators.[41] This authority allows local governments to establish appropriate consumer complaint resolution mechanisms appropriate to the size and other unique characteristics of each community. Recent local problems with cable modem service roll-outs illustrate the range of consumer actions local communities must pursue. Several cable operators are having difficulty with joint billing of cable modem and other cable services. Many cable operators are having difficulty training sufficient telephone Customer Service Representatives and field technicians to accommodate cable modem consumer questions and repairs.[42] Each of these is a unique situation that warrants close attention by the local franchise authority.

---

41 47 U.S.C. §552 provides:

(a) Franchising Authority Enforcement

A franchising authority may establish and enforce - (1) customer service requirements of the cable operator; and (2) construction schedules and other construction-related requirements, including construction-related performance requirements, of the cable operator.

. . .

(d) Consumer Protection Laws And Customer Service Agreements

(1) Consumer Protection Laws

Nothing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title.

(2) Customer Service Requirement Agreements

Nothing in this section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b) [of this section]. Nothing in this title shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.

42 For examples of this particular consumer service concern as well as other local problems with cable modem service roll-outs. See Attachment C.

Additionally, local governments expect the Commission to acknowledge that federal law assigns local governments responsibility for judiciously shepherding their most valuable asset —the public rights-of-way—to assure multiple, conflicting uses are accommodated in furtherance of federal policies encouraging market entry and competition, while assuring that the private use of public property does not thwart the public benefit to which it is dedicated. Local authority to manage and to receive compensation for access to the right-of-way is recognized in both Title II and Title VI.

Title VI establishes a comprehensive franchise fee mechanism to assure equitable treatment among all cable service providers, including Open Video System operators.[43] The classification of cable modem service as a "cable service," will permit individual local governments to negotiate the application of those fees to cable modem service revenues in balance with incentives to operators to upgrade their facilities. Classification of cable modem service as a telecommunications service, on the other hand, raises the prospect of gamesmanship in the pricing and bundling of cable modem service with traditional cable programming. It also, in many cases, requires state legislation to extend the existing authority of local governments to more explicitly authorize the imposition of franchise fees on "hybrid" uses of the right-of-way. Further, Title VI does not restrict local franchising authority to impose fees in connection with the use of the right-of-way to provide "other communications service" over the cable system, or regulate the level of those fees.[44]

---

[43] 47 U.S.C. § 542(b), § 573(c)(2)(B).

[44] The Cable Act specifically anticipates a level-playing field in franchise fees regardless of the ownership structure of the particular "cable service":